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No. 90-432

Supreme Court, U.S.
FILED
OCT 11
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JAMES N. PERRY,

Petitioner,

v.

PRUDENTIAL-BACHE SECURITIES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

RONALD M. GREEN *
EPSTEIN BECKER & GREEN, P.C.
250 Park Avenue
New York, New York 10177
(212) 351-4500

FRANK C. MORRIS, JR.
THOMAS R. BAGBY
EPSTEIN BECKER & GREEN, P.C.
1227 25th Street, N.W.
Suite 700
Washington, D.C. 20037
(202) 861-0900

Attorneys for Respondent Prudential-Bache Securities, Inc.

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED FOR REVIEW

Whether summary judgment properly was awarded to respondent on petitioner's claim under the Age Discrimination in Employment Act, as amended, 29 U.S.C. §§ 621 *et seq.* ("ADEA"), where the evidence established indisputably that petitioner's employment was terminated because of his superiors' dissatisfaction with his job performance and that age played no part in the decision?

PARTIES BELOW AND PARENT COMPANIES

The names of the parties below are properly identified in the Petition. The Prudential Insurance Company of America is the parent company of respondent Prudential-Bache Securities, Inc.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Prudential-Bache Securities, Inc. ("Pru-Bache") respectfully requests that this Court deny the Petition for a Writ of Certiorari seeking review of the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The judgment order (without opinion) of the United States Court of Appeals for the Third Circuit is published at 904 F.2d 696 and is set forth in the Appendix to the Petition ("Pet. App.") at 2a. The opinion of the United States District Court for the District of New Jersey is reported at 738 F. Supp. 843 and is contained in Pet. App. at 3a-20a.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on May 2, 1990. A petition for rehearing was denied by order of that court dated June 13, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

In addition to the provisions set forth in the Petition at 2-3, the ADEA, as amended, 29 U.S.C. § 623(f), provides as follows:

> It shall not be unlawful for an employer, employment agency, or labor organization—
>
> (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;
>
> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or
>
> (3) to discharge or otherwise discipline an individual for good cause.

STATEMENT OF THE CASE

Petitioner seeks review of a judgment order of the United States Court of Appeals for the Third Circuit affirming without opinion a decision awarding summary judgment in favor of Pru-Bache on petitioner's termination claim under the ADEA.

A. Factual Background

After having been employed by Pru-Bache (or its predecessors) for a number of years, Perry served as National Manager of Underwriting with Pru-Bache from 1982 to March 1985. In that position, Perry did not have broad management or supervisory responsibilities.

Notwithstanding previously expressed concerns about Perry's managerial capabilities, in March 1985, at the age of 54, Perry was promoted to the position of Manager of the Municipal Department. Perry's promotion to Manager of the Municipal Department entailed a substantial change and increase in his job responsibilities, including far broader responsibilities that required Perry to exercise significant supervisory and managerial responsibilities.

Throughout his eighteen-month tenure as Manager of the Municipal Department from March 1985 to October 1986, during which time he earned $350,000 per year, Perry's job performance was a source of serious dissatisfaction to his superiors and to many of his subordinates. This dissatisfaction fell into four broad, though interrelated, categories. First, Perry's superiors believed that he failed to manage his department properly, particularly with regard to providing leadership and direction to his subordinates. Second, Perry's superiors believed that he failed to have the Municipal Department's bond inventory "marked-to-market" adequately, that is, the value of the firm's bond inventory was not being properly and completely recorded on a daily basis as required. Third, Perry's superiors were consistently dis-

satisfied with the level of profitability obtained by the Municipal Department. Fourth, and perhaps most significantly, the relationship between Perry and his superiors became strained to the point that one of his superiors (who was 53 years of age at the time of Perry's termination) virtually refused to speak to Perry, making it impossible to work effectively. Perry failed to present any evidence that called into question his superiors' individual and collective dissatisfaction with his performance in the position from which he was terminated.

Due to his superiors' collective dissatisfaction with his performance in the position of Manager of the Municipal Department, Pru-Bache terminated Perry's employment in October 1986.

B. Procedural Background

In January 1988, Perry filed an action in the United States District Court for the District of New Jersey alleging ADEA violations and pendent age discrimination claims under New Jersey law. Following extensive discovery and after oral argument, the district court on October 30, 1989 granted Pru-Bache's motion for summary judgment. Pet. App. at 3a-20a.

Perry appealed the award of summary judgment in favor of Pru-Bache to the Third Circuit. By a judgment order dated May 2, 1990, the court of appeals affirmed the district court without opinion. Pet. App. at 2a. The court of appeals denied Perry's request for rehearing by order dated June 13, 1990.

REASONS FOR DENYING THE WRIT OF CERTIORARI

Perry seeks to have this Court review the affirmance by the court of appeals *without opinion* of the award of summary judgment in favor of Pru-Bache. While he expresses disagreement with the result in that judgment order, he has not demonstrated that the judgment order of the court of appeals is in conflict with a decision of another United States court of appeals nor has he shown that the judgment order so far departed from the accepted and usual course of judicial proceedings to call for the exercise of this Court's power of supervision. *See* Sup. Ct. R. 10.1(a). Rather, the record in this case demonstrates that the courts below acted entirely properly and, accordingly, it is respectfully requested that the writ be denied.

The decisions below in this case are wholly in accord with this Court's pronouncements on the propriety of and standards relating to summary judgment under Rule 56 of the Federal Rules of Civil Procedure. For example, this Court instructed in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original), that "[b]y its very terms, [Rule 56] provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact."

Further, this Court has observed that no *genuine issue of material fact* exists where the non-moving party fails to make a sufficient showing as to the existence of an essential element of its case on which it will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Moreover, where the evidence in opposition to the motion is "merely colorable" or "not significantly probative," *Anderson*, 477 U.S. at 249-50, summary judgment may be granted. The Court in *Celotex*, 477 U.S. at 327 (citation omitted), also stated that:

> [s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action."

Of particular importance to the instant case was the Supreme Court's observation in *Celotex*, 477 U.S. at 327, that:

> Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

When, as here, a motion for summary judgment is properly supported, the nonmoving party cannot rest on mere allegations but is required to set forth specific facts demonstrating that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Liberty Lobby*, 477 U.S. at 248-49. Thus, mere allegations, unsupported by evidence, cannot defeat a properly supported motion for summary judgment. *See, e.g., Liberty Lobby*, 477 U.S. at 247-48. Moreover, contrary to Perry's apparent contention, summary judgment is not inappropriate simply because issues of intent may be involved. *See, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 597-98 (1986).

In the instant case, Perry ignored these clearly established principles under Rule 56 and pertinent decisions of this Court and failed to offer evidence on the critical issues on which he would bear the burden of proof at trial. For example, Perry failed to produce evidence that he met the legitimate expectations of his employer in the new position he held at the time of his termination. As the district court properly observed, "[w]hile Perry's opposition papers are filled with evidence of the high calibre of his work as an underwriter, nowhere has he produced evidence to support a finding that he performed

his supervisory obligations in a manner that was satisfactory to his employer." Pet. App. at 17a. Absent this required showing, Perry failed to establish even a prima facie case of discrimination relating to his termination. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Spangle v. Valley Forge Sewer Auth.*, 839 F.2d 171, 173-74 (3d Cir. 1988) (no prima facie case established where employee failed to adduce any evidence to support a finding that he was performing satisfactorily his supervisory and managerial duties, although he could perform the technical aspects of the job).[1]

Even assuming arguendo, as the district court did, that Perry somehow established a prima facie case, the courts below properly determined that Perry had not produced evidence sufficient to create triable issues of fact on the question of whether the reasons proffered by Pru-Bache for the termination of Perry's employment were a "pretext" for unlawful discrimination. *See* Pet. App. at 17a-18a; *Burdine*, 450 U.S. at 256. After thoroughly considering the "evidence" of discrimination proffered by Perry, the district court properly concluded that:

> Perry has not presented this Court with anything which would call into question the credibility of Pru-Bache executives or tend to demonstrate that Pru-Bache acted with an impermissible motive. Obviously, without counter-affidavits or other evidence that there is reason to disbelieve [the] employer's "legitimate" reasons for discharge, a plaintiff will be deemed to have failed to set forth an issue of fact, and thus failed to have demonstrated that the proffered reason was a pretext for discrimination.

Pet. App. at 18a (citations omitted).

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[1] Perry's contentions that he was qualified because of his performance in a previous, less-demanding job with fewer supervisory responsibilities provided no evidence that he was meeting his supervisor's expectations in the new job.

Thus, it is clear that the courts below assiduously followed the law as set forth by this Court with regard to the award of summary judgment in civil cases generally and in the context of an equal employment dispute. Accordingly, Perry has failed to demonstrate any reason why this Court should exercise its power of supervision to review this case.

Because he otherwise is unable to show any reason why review of the case should be granted, Perry argues that this Court should grant his petition because the judgment order entered *without opinion* by the Third Circuit purportedly is "contrary" to a previously decided case in the same circuit. As discussed below, there is in fact no inconsistency between the two decisions. In any event, any purported inconsistency between two decisions from the same circuit does not provide a basis for this Court to exercise its discretion to review the instant case.

Perry contends that the judgment order without opinion of the Third Circuit in the instant case somehow is "contrary" to the decision of the Third Circuit in *Siegel v. Alpha Wire Corp.*, 894 F.2d 50 (3d Cir.), *cert. denied*, 110 S. Ct. 2588 (1990). Because the instant case was decided by the Third Circuit by a judgment order *without opinion*, Perry admittedly can only attempt to surmise why the two cases were decided as they were.[2] An examination of the two cases, however, demonstrates that any difference in results turned not on different burdens of proof, but rather on Perry's failure to produce evidence on critical aspects of his case on which he would bear the burden of proof at trial.

Unlike in *Siegel*, Perry had not received favorable performance evaluations from any of his three superiors in his new position as Manager of the Municipal Depart-

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[2] Perry states in his Petition that "a comparison between the instant decision and the other one best demonstrates how there *seems to be* two different burdens of proofs [sic] in age discrimination cases within the Third Circuit, depending, *it seems*, on the sophistication of the employee." Petition at 6 (emphasis added).

ment. Rather, all of his superiors, and others, had expressed serious concerns about Perry's performance in his new position. Perry chooses to ignore the critical distinction that he simply failed to produce evidence either that he was meeting the legitimate expectations of his superiors in his new position or on the issue of whether the reasons for his termination by his superiors were a pretext for unlawful age discrimination. Absent this critical evidence, the district court had no choice but to enter summary judgment in favor of Pru-Bache.[3]

In sum, any difference between the instant case and *Siegel* resulted not from a greater burden of proof applied in this case, but rather from a lack of evidence produced by Perry to raise a genuine dispute as to whether his age was the reason for his discharge.[4]

In this case, Perry elected to rest on his pleadings, on his conclusory allegations of discrimination, and on his contention that he could disprove Pru-Bache's legitimate, nondiscriminatory reasons for his discharge if allowed to

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[3] Moreover, the district court in this case properly and thoroughly considered and rejected Perry's other purported "evidence" of discrimination, including, inter alia, purported age-related remarks and notations. *See* Pet. App. at 17a-19a. The district court correctly observed that any purported age-related remarks either were "jocular" in nature or were not in fact age-related at all. *Id.* at 18a-19a n.5; *see also Gagne v. Northwestern Nat'l Ins. Co.*, 881 F.2d 309, 314 (6th Cir. 1989); *Mantione v. Ted Bates Advertising*, 38 Fair Empl. Prac. Cas. (BNA) 1457, 1462 (S.D.N.Y. 1985). The district court also correctly determined that a reference to Perry's age on a memorandum prepared after the decision to terminate him had been made related to the possibility of funding Perry's pension and did not provide evidence that Perry's termination was because of his age. Pet. App. at 17a-18a.

[4] Even if the results in the two Third Circuit cases were in fact "contrary," as Perry incorrectly contends, that "contrary" result is one that properly should be rectified by the Third Circuit and not by this Court. By denying Perry's request for rehearing, where he raised the same contention, the Third Circuit apparently rejected Perry's argument that its decision in the instant case was "contrary" to its decision in *Siegel*.

do so at trial. He produced no credible evidence, however, that demonstrated that his age was the reason for his termination. Such speculative and conclusory assertions of discrimination without evidentiary support simply are not sufficient to defeat a properly supported motion for summary judgment, *see Liberty Lobby*, 477 U.S. at 247-48; *Celotex*, 477 U.S. at 324-25; *Matsushita*, 475 U.S. at 586-87; *Healy v. New York Life Ins. Co.*, 860 F.2d 1209, 1216 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 2449 (1989), and the courts below properly determined that summary judgment was appropriate in favor of Pru-Bache.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

RONALD M. GREEN *
EPSTEIN BECKER & GREEN, P.C.
250 Park Avenue
New York, New York 10177
(212) 351-4500

FRANK C. MORRIS, JR.
THOMAS R. BAGBY
EPSTEIN BECKER & GREEN, P.C.
1227 25th Street, N.W.
Suite 700
Washington, D.C. 20037
(202) 861-0900

Attorneys for Respondent Prudential-Bache Securities, Inc.

* Counsel of Record